

July 11 2008

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

## IN THE SUPREME COURT OF THE STATE OF MONTANA

AF- 08-0203

IN THE MATTER OF THE MONTANA  
CODE OF JUDICIAL CONDUCTWRITTEN COMMENT ON  
PROPOSED CODE OF JUDICIAL  
CONDUCTSUBMITTED BY MICHELE L.  
SNOWBERGER, BELGRADE CITY  
JUDGE

FILED

JUL 11 2008

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

I am the Belgrade City Court Judge, a Court of Limited Jurisdiction. I  
make the following comments regarding the proposed Code of Judicial Conduct.

First, let me express my sincere appreciation for the hard work of the  
Supreme Court Commission on Code of Judicial Conduct in developing the  
proposed Code of Judicial Conduct.

In general, I agree with the majority of the proposed judicial canons; but, I  
do provide the following comments on specific rules. Some of my comments  
apply to any judge, and some apply to the unique application of these rules to  
Courts of Limited Jurisdiction (COLJ).

In addition to the individual changes to the proposed Rules, I am  
requesting that the comment period be extended until after the COLJ Fall  
Conference. The Commission for Courts of Limited Jurisdiction has placed the  
Rules on the schedule for the COLJ Fall Conference. I am requesting this

extension to provide the greatest level of discussion of the rules amongst the judges.

**CANON 2     A Judge Shall Perform the Duties of Judicial Office  
Impartially, Competently, and Diligently**

**Rule 2.6     Ensuring the Right to Be Heard**

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Comment [2] lists factors that should be considered when determining whether a judge should participate in settlement negotiations. However, the comment does not provide any guidance as to how these factors are to be applied.

**REQUEST**     The comment be amended to provide the weight and preference in applying the factors.

**Rule 2.9     Ex Parte Communication**

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Rule 2.9 (A) prohibits ex parte communication with a judge. The Rule further provides a method to notify all parties of the ex parte communication and to permit an opportunity to respond. Clearly, prohibiting ex parte communication of substantive issues should be implemented. And, I believe that the requirement for notification is appropriate.

The Rule contemplates that ex parte communication is permitted to address non-substantive scheduling, administrative, or emergency purposes. And, then requires that the judge promptly notify all parties and give them an opportunity to respond.

This level of notification for ex parte administrative communications in COLJ is simply not practical. The majority of cases filed in Belgrade City Court are traffic and misdemeanors offenses. In approximately 90 percent of these cases, the City Prosecutor is not involved in the case. This is because the parties have either forfeited their bond or pleaded guilty at the initial appearance.

The Belgrade City Court is currently staffed by one full time clerk and one part time clerk. As a judge, I daily answer the phone and/or assist individuals at the clerk's office. These ex parte conversations do not involve substantive discussions with a party about a case. In addition, I frequently schedule hearings or other court appearances. I attempt to do so by conference call, but this is usually impractical.

It is impossible to eliminate ex parte communication from my daily activities. To require a judge to give a notification about every communication, including a simple phone request confirming a hearing date, would severely strain the limited judicial resources available to COLJ judges.

Additionally, there are several COLJ judges that do not even have a court clerk. The judge handles all administrative functions for the court. In these cases, it would be impossible for these courts to operate if they were required to give notification for every ex parte communication.

**REQUEST** The Rule be modified to eliminate the requirement for notification to all parties of scheduling or administrative or emergency purposes.

Rule 2.9(C) prohibits a Judge from making independent investigation.

The Belgrade City Prosecutor is a contract attorney. He does not appear for initial appearances and/or change of plea hearings. Most COLJ prosecutors are not in court for all court hearings. In general, COLJ judges gather information, including viewing driving records and information compiled on the Full Court Repository.

Currently, data from Full Court, the COLJ case management system is uploaded to a central repository. It is common to search the database for information on defendants, including, but not limited to, current contact information and convictions. Also, the Court frequently searches the Department of Justice driver's license records.

Some courts have court clerks who have CJIN access. This information may be used in a variety of ways, including determining if there is an order of protection in place.

This information is vital to being able to effectively deal with an individual defendant. Unfortunately, COLJ do not have the resources to obtain this information through the prosecutor's office.

**REQUEST** This Rule should be clarified to permit this type of information gathering and review by a Judge or COLJ court clerk.

Rule 2.9(D) requires that a Judge ensure that this Rule is not violated by individuals subject to the judge's direction and control.

Unlike Clerks of District Court, COLJ clerks are under the judge's direct supervision. COLJ court clerks are trained to stop any substantive ex parte communication with a party. They are trained to assist court users to enable equal access to the courts, inter alia, by providing information to on how to file a complaint, how to bring a motion to the court, and what happens at an initial appearance or change of plea hearing. Court clerks also take pleadings, schedule routine hearings, and confirm upcoming deadlines and court dates. All of this if performed by a judge would be considered to be ex parte communication requiring notification to the other side and an opportunity to respond.

Additionally, many self-represented litigants (SRL) do not understand the concept of ex parte communication and regularly tell court clerks substantive information about the case. Court clerks are trained to stop this type of communication. But, sometimes despite their best efforts, SRLs continue to self disclose substantive information. Court clerks have been instructed not to share this information with anyone, not the judge nor the city prosecutor. It seems misguided, to require the court clerks to tell the judge this information, solely for the purpose of complying with this rule. The SRL is put in a worse position than if the court clerk just kept this information to herself.

The court has insufficient resources to provide this level of notification regarding every single ex parte communication. If the judge is required to provide notification for every ex parte communication that occurs between a clerk and a party, the court will be unable to function.

**REQUEST** Rule 2.9 be modified to eliminate the requirement for notification to all parties of scheduling or administrative or emergency purposes.

**Rule 2.12 Supervisory Duties**

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Comment [1] to this Rule states that "a judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge."

Clearly, a COLJ judge should not permit a violation of the Code by their staff that undermines the judiciary. Please see comments under Rule 2.9 for the unique situation between COLJ judges and the court clerk's office.

**REQUEST** This Rule be modified to accurately reflect the realities of the interaction between a COLJ Judge and the COLJ Court Clerk's Office.

**CANON 3 A Judge Shall Conduct the Judge's Personal and Extrajudicial Activities to Minimize the Rules of Conflict with the Obligations of Judicial Office**

**Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal or Civic Organizations and Activities**

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Rule 3.1 Comment [2] states that "[p]articipation in both law-related and extrajudicial activities helps to integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system."

Unfortunately, Rule 3.7 may impose strict restrictions on a judge's community involvement and limits a judge's abilities to do so in such a way as to make the participation unsatisfactory. Currently, many judges are engaged in community activities in direct and concrete ways. Judges volunteer for a Food Bank, Big Brothers-Big Sisters, Rotary, Boys and Girls Clubs, 4-H clubs, as coaches for school and Little League, just to name a few.

Rule 3.7(A)(6) prohibits "making recommendations to [non-law related] public or private fund-granting organization or entity in connection with its programs or activities..."

There is no definition for fund-granting organization. The vast majority of educational, religious, charitable, fraternal, or civic organizations do some level of fund-granting. An organization may provide direct funds, scholarships, or even funding medical research. There is no definition or comment to assist a judge in determining whether an organization is a fund-granting organization.

Rule 3.7 Comment [3] states that mere attendance at an event is not a violation of this Rule. And, states that it is permissible to act as an usher, or food server, or preparer.

It is not clear by this comment, whether handling of any money at an event is permissible. Is it permissible to take money in exchange for an entrance fee, dinner, raffle ticket, or a bake sale?

I am detailing my volunteer activities to provide a framework for discussion on the proposed Rule's implementation.

In my case, I volunteer for two organizations. My volunteer activities are deeply and personally connected to my vision of myself as a human being. I know that I am not alone in my commitment to volunteerism. In my discussions with judges across Montana, I hear how important and vital these activities are to judges. And, particularly in rural Montana how important each and every volunteer is to the community.

Eagle Mount, Bozeman provides therapeutic recreational activities for persons with disabilities. Eagle Mount does provide scholarships to participants. It is unclear if Eagle Mount would be considered a fund-granting organization. I started volunteering at Eagle Mount before I became a judge. I am a certified equestrian instructor for Eagle Mount. I teach between 2 and 5 classes per session. My volunteerism goes beyond mere teaching. For instance, I attend instructor meetings to discuss program related issues and how to improve the program. I have been a member of Eagle Mounts Extraordinary Program Committee. The purpose of this committee was to develop a plan to increase program offerings, improve current programming, increase staff skill, and to increase volunteer, family, and participation involvement. I have also assisted in drafting the current volunteer handbook and am on the re-accreditation team. And, on occasion, we have discussed ways that the equestrian program may work to increase funding or to obtain specific items of need. I have never directly solicited contributions for Eagle Mount.

I am also a Local Program Coordinator (LPC) for Big Sky Rams, a Special Olympics Team. This equates to a position of head coach. This is an extremely



personal involvement for me. This team was started because my sister wanted to compete in Special Olympics and there was no opening on any other team. And, for two years, we were a team of 1. My sister died in 2007; however, the team continues and we now have 5 athletes who are only able to participate in Special Olympics because this team exists. I continue my work with Special Olympics in memory of my sister and because I am firmly committed to the empowerment of all individuals. As an LPC, I am required to attend meetings to discuss issues relating to Special Olympics. And, I make recommendations in connection to its programs and activities. To date, no other volunteer has come forward to take over the position of LPC. If I were not the LPC, this team would have to be disbanded. But, is Special Olympics a "fund-granting organization" because all of their programs are offered free of charge to the athlete?

My current volunteer activities may be prohibited upon the enactment of the current version of Rule 3.7. I have never found that my volunteer activities have in any way undermined my independence, integrity, or impartiality, as the Belgrade City Judge. I would find it particularly difficult to have to give up such rewarding and meaningful activities.

**REQUEST** Rule 3.7 be modified to permit direct and concrete participation in educational, religious, charitable, fraternal or civic organizations and activities.

Rule 3.7 provide a definition of a "fund-granting" organization.

Rule 3.7 to permit a judge to accept money for tickets, or at a table at a fund-raising program (for example, a bake sale)

And, that as long as the judge is not engaged in direct solicitation, may provide assistance to an organization regarding fund raising.

### **Rule 3.8      Appointments to Fiduciary Positions**

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Rule 3.8 Section (A) states that "[a] judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for .... a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties."

This is troublesome. I certainly understand the need to remain objective and neutral. However, should not a god parent be able to assume the duties of guardian if the godchild's parents are irreparably incapacitated or die?

Is it not possible to be a personal representative for a friend? Before I became a judge, I was approached and agreed to be the personal representative of a dear friend who has no local family. I do not see how this harms the judiciary, so long as it does not interfere with the proper performance of my judicial duties.

**REQUEST**      Rule 3.8 be modified to permit these types of duties so long as it does not interfere with the proper performance of judicial duties.

### **Rule 3.9      Service as Arbitrator or Mediator**

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This Rule prohibits a judge from participating in other "judicial functions apart from the judge's official duties unless expressly authorized by law."

Does this mean that a judge may participate in settlement negotiations for a case pending before another judge?

Does this prohibit a judge from serving as an elder or deacon in a church? Often, these positions require interpretation of church law and mediation between church members. The Rule should be modified to permit such activities.

**REQUEST** Rule 3.9 be clarified to permit a judge to participate in settlement negotiations for a case being handled by another judge.

Rule 3.9 be modified to permit "judicial functions" that are conducted within the framework of a religious organization, so long as it does not interfere with the proper performance of judicial duties.

#### **Rule 3.10 Practice of Law**

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Rule 3.10 (A) states that a "full time judge shall not practice law." This appears to contradict the "Application Section" of the proposed canons.

Application II (B) states that: "A full-time judge shall not practice law or act as an attorney or lawyer in any proceeding except as permitted by law or by this Code."

Section 3-1-602, MCA states that a justice of the peace who is a licensed attorney may practice law except in his court, any other justice court located in the same county, or in a case which is appealed from such a court.

Section 3-1-604, MCA prohibits a municipal court judge from practicing law in his own court.

There is no statutory authority prohibiting a City Judge from practicing law in any court. I believe it to be an ethical violation if I were to practice law in Belgrade City Court.

Currently, I have an extremely limited practice, involving a few pro bono cases regarding guardianship, and a very limited estate planning practice. I have never found my practice to in any way interfere with my duties as a City Judge.

This Rule would prohibit me from practicing law.

I recommend that this Rule be modified to permit COLJ, who are licensed attorneys, to practice law, so long as it is not in their court.

**REQUEST** Rule 3.10 be modified to specifically state that full time COLJ judges may practice law so long as it is not in their court and so long as it does not interfere with the proper performance of judicial duties.

**Rule 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, or Other Things of Value**

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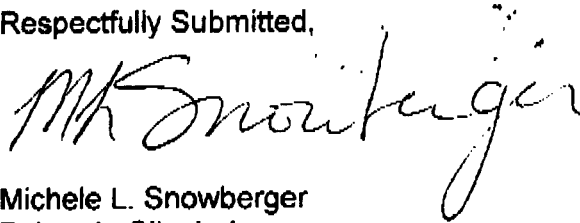
Rule 2.13 (B) (2) states that a judge may only accept items of value if the giver's appearance in court would require disqualification. Rule 2.13 (B) (3), but states that ordinary social hospitality is acceptable. There is no definition of ordinary social hospitality and the comments do not address it.

Is it permissible to accept a dinner invitation? Is dinner a thing of value or, is it ordinary social hospitality?

**REQUEST** Rule 3.13 define social hospitality. And, more importantly provide examples of what ordinary social hospitality is and what it is not.

Thank you for the opportunity to comment on the proposed canons.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "MK Snowberger". The signature is written in a cursive, flowing style.

Michele L. Snowberger  
Belgrade City Judge